(1) (3)

Supreme Court, U.S.
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Nos. 01-1437 & 01-1596

In The
Supreme Court of the United States

BEATRICE BRANCH, *et al.*,

Appellants, Cross-Appellees,

v.

JOHN ROBERT SMITH, *et al.*,

Appellees, Cross-Appellants.

On Appeal From The United States District Court For The Southern District Of Mississippi

JOINT APPENDIX

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APPENDIX 1

U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI (JACKSON)

No. 01-CV-855

Smith, et al.

v.

Clark, et al.

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
11/1/01	COMPLAINT.
11/1/01	Magistrate Judge Assignment James C. Sumner.
11/1/01	Case assigned to Pending Track - designation of appropriate track will be made after Case Management Conference and a final track assignment.
11/2/01	SUMMONS(ES) issued for defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove, defendant MS Republican Pty., defendant MS Democratic Party
11/8/01	MOTION by plaintiff John Robert Smith, plaintiff Shirley Hall, plaintiff Gene Walker for Preliminary Injunction

Date	PROCEEDINGS
11/9/01	MOTION by movant Richard Barrett to Intervene by Richard Barrett
11/9/01	AFFIDAVIT by movant Richard Barrett Re: [3-1] motion to Intervene by Richard Barrett by movant.
11/13/01	ANSWER to Complaint by defendant MS Republican Pty. (Attorney Michael B. Wallace).
11/14/01	RESPONSE by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove to [2-1] motion for Preliminary Injunction by plaintiffss and CROSS-MOTION, to Dismiss.
11/14/01	Rule 16.1(A) Initial Order; copies mailed.
11/14/01	Telephonic Case Management Conference set 10:30 1/22/02 location: Jackson, MS before Magistrate Judge James C. Sumner copies mailed to Michael B. Wallace, Arthur F. Jernigan Jr.
11/16/01	ORDER, Response to Motion reset to 11/26/01 for [6-2] motion, Reply to Response to Motion reset to 11/29/01 for [6-2] motion. Court intends to request certification of 3-judge court to address motion for preliminary injunction as well as State Defendants' motion to dismiss (signed by Judge Henry T. Wingate).
11/21/01	Minute entry: Hearing held on 11/14/01 before Judge Wingate, CR. Brenda Wolverton; Status Conference held a schedule was initiated.

Date	PROCEEDINGS
11/21/01	ORDER the Chief Judge of the US Court of Appeals for the Fifth Circuit designates Henry T. Wingate, E. Grady Jolly and David C. Bramlette, III, U. S. circuit and district judges as members of the three-judge district court to hear and resolve this matter.
11/21/01	Case assigned to panel of Judge Henry T. Wingate and Judge E. G. Jolly and Judge David C. Bramlette III
11/21/01	RESPONSE by defendant MS Democratic Party to [2-1] motion for Preliminary Injunction by plaintiffs.
11/26/01	RESPONSE by defendant MS Republican Pty. to [2-1] motion for Preliminary Injunction by plaintiffs
11/28/01	NOTICE of Hearing: Motion Hearing set for 3:00 11/30/01 for [6-2] motion, set for 3:00 11/30/01 for [3-1] motion to Intervene by Richard Barrett, set for 3:00 11/30/01 for [2-1] motion for Preliminary Injunction.
11/29/01	MOTION by movants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph P Hudson, Robert R. Norvel Sr. to Intervene
11/30/01	REPLY by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove to response to [6-2] motion by defendants.

Date	PROCEEDINGS
12/4/01	NOTICE of Submission of Intervenors regarding recent State Court Developsments by movants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph P Hudson, Robert R. Norvel Sr.
12/5/01	ORDER granting [14-1] motion to Intervene, denying [6-2] motion, denying [3-1] motion to Intervene by Richard Barrett, deferred [2-1] motion for Preliminary Injunction
12/6/01	NOTICE of Attorney Appearance for defendant MS Democratic Party by John G. Jones, Herbert Lee Jr. in place of Shane Langston and Omar Nelson
12/18/01	RESPONSE by defendant MS Republican Pty. to Motion for Leave to Amend and For Preliminary Injunction.
12/19/01	NOTICE of Hearing: Motion for Leave to Amend and for Preliminary Injunction set before three-judge court 12/28/01 at 3:00p.m.
12/20/01	MOTION by plaintiffs for Preliminary Injunction, for Leave to File Amended Complaint
12/21/01	RESPONSE by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove to [21-1] motion for Preliminary Injunction by plaintiffs, [21-2] motion for Leave to File Amended Complaint by plaintiffs

Date	PROCEEDINGS
12/21/01	RESPONSE by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to [21-1] motion for Preliminary Injunction by plaintiffs, [21-2] motion for Leave to File Amended Complaint by plaintiffs
12/28/01	Motion hearing held re: redistricting plan
1/7/02	ORDER granting [21-2] motion for Leave to File Amended Complaint; Granting Motion for Branch and Barber to Intervene; Motion for Preliminary Injunction deferred; Briefing Schedule established as set out herein
1/8/02	AMENDED COMPLAINT by plaintiffs John Robert Smith, Shirley Hall, Gene Walker
1/9/02	SUPPLEMENTAL RESPONSE by defendants Eric Clark, Mike Moore, Ronnie Musgrove to [21-1] motion for Preliminary Injunction by plaintiffs
1/9/02	MOTION to Intervene by Jimmy D. Giles
1/10/02	Supplemental RESPONSE by intervenor-defendant Beatrice J. Branch, et al., to [21-1] motion for Preliminary Injunction.
1/10/02	ORDER denying [27-1] motion to Intervene by Jimmy D. Giles
1/10/02	Minute entry: Hearing held 12/28/01 before Judges Jolly, Wingate, Bramlette in Jackson, MS, on redistricting plan. Carol Gray c/r. ACTION TAKEN: Under advisement.

Date	PROCEEDINGS
1/10/02	EXHIBITS TO REDISTRICTING HEARING
1/11/02	MOTION by movant Jimmy D. Giles For Rehearing EN BANC
1/11/02	Supplemental Submission of Mississippi Republican Executive Committee in Connection with Motion for Preliminary Injunction
1/15/02	ORDER, that because it now appears to be uncertain that the State authorities will have a redistricting plan in place by 3/1/02, Federal authorities will assert jurisdiction. Accordingly, Federal authorities will begin the process of drafting and implementing a plan for reapportioning Mississippi's congressional districts. In accordance with this order, a scheduling conference is set Scheduling Conference for 3:30 1/16/02
1/18/02	Letter requesting attachment of Exhibits to Amended Complaint by plaintiff John Robert Smith
1/18/02	SCHEDULING ORDER setting Designate experts for plaintiff by 3:00 1/18/02 ; Designate experts for defendant by 3:00 1/18/02 ; Parties shall exchange exhibits by 5:00 1/23/02; Any party may take depositions at any time inclusive of 1/19-24/02; Pretrial order is due by 2:00 1/25/02; Trial set 9:30 1/28/02 and shall conclude no later that 5:00 on 1/29/02; Telephonic Case Management Conference previously scheduled 10:30 1/22/02 is CANCELED.

Date	PROCEEDINGS
1/25/02	MOTION by movant Kenneth J. Goodwin for Consideration of Redistricting Map.
1/28/02	Submission of Mississippi Farm Bureau Federation Relating to Congressional Redistricting.
1/28/02	TRANSCRIPT filed for dates of 12/28/01 on Hearing on Motion for Preliminary Injunction
1/29/02	EXHIBIT/WITNESS LIST TO HEARING HELD 1/28/02 AND 1/29/02
1/29/02	Minute entry: Redistricting Hearing held 1/28/02 and 1/29/02 before Judges Jolly, Wingate and Bramlett in Jackson, MS. CR: Brenda Wolverton; Action Taken: Parties declined presentation of closing summations. Post Trial Briefs may be filed with deadline of 1/31/02.
1/29/02	PRETRIAL ORDER filed
1/30/02	NOTICE of Filing of Submission of the Attorney General to United States Department of Justice and the State Court Record with the Clerk of Court on 1/18/02 by plaintiff John Robert Smith, plaintiff Gene Walker
1/30/02	Letter from David Webb with redistricting plan map attached.
1/31/02	Post-Trial Submission of Intervenors
2/1/02	TRANSCRIPT filed for dates of 1/28/02-1/29/02
2/4/02	ORDER with attached Courts congressional redistricting plan for the State of Mississippi. Objections due by 2/9/02 at 4:00p.m.

Date	PROCEEDINGS
2/8/02	Second Supplemental Submission of Mississippi Republican Executive Committee in Connection with Motion for Preliminary Injunction
2/8/02	Comments of the Plaintiffs and Mississippi Republican Executive Committee
2/8/02	Response by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to [44-1] order
2/15/02	NOTICE of Receipt of Letter from United States Department of Justice by defendant Eric Clark, defendant Mike Moore, defendant Ronnie Musgrove
2/15/02	Further submission/Attachment by Beatrice J. Branch, et al., intervenor-defendants, in opposition to motion for injunctive relief
2/15/02	Third Supplemental Submission of Mississippi Republican Executive Committee in Connection with Motion for Preliminary Injunction
2/19/02	ORDER that parties are directed to address by simultaneous letter briefs to question set out herein by 5:00p.m.
2/19/02	OPINION that if Chancery Court plan has not been precleared before the close of business 2/25/02, the plan attached to Order of 2/4/02 shall operate as the plan for congressional districts for the State of Mississippi for 2002 congressional elections and, on 2/26/02, an injunction shall be entered directing

Date	PROCEEDINGS
	defendants to conduct 2002 congressional elections pursuant to the congressional redistricting plan attached to 2/4 order.
2/19/02	MOTION by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to Stay, and For Injunction
2/19/02	RESPONSE by plaintiffs John Robert Smith, Shirley Hall, Gene Walker to [53-1] motion to Stay by intervenor-defends
2/20/02	ORDER denying [53-1] motion to Stay, denying [53-2] motion For Injunction
2/21/02	PRETRIAL ORDER filed
2/21/02	Fourth Supplemental Submission of Mississippi republican Executive Committee in connection with Motion for Preliminary Injunction
2/25/02	Intervenors Additional Further Submission in Opposition to Plaintiff's Motion for Injunctive Relief
2/26/02	OPINION and ORDER in the light of the foregoing analysis, the congressional redistricting plan adopted by the chancery court is declared unconstitutional, and the state's implementation of the chancery court plan is enjoined, as per our Final Judgment entered today.
2/26/02	FINAL JUDGMENT For reasons stated in opinions of 2/29/02, and 2/26/02, defendants are hereby enjoined from implementing the

Date	PROCEEDINGS
	congressional redistricting plan adopted by Chancery Court for the First Judicial District of Hinds County, Mississippi. The defendants are enjoined from implementing the former five-district congressional redistricting plan. The defendants implement the congressional redistricting plan adopted by this court in its order of 2/4/02, for conducting congressional primary and general elections for the state of Mississippi in 2002. Defendants shall use the congressional redistricting plan adopted by this court in its order of 2/4/02, in all succeeding congressional primary and general elections for the State of Mississippi. This court shall retain jurisdiction to implement, enforce, and amend this order as shall be necessary and just.
2/26/02	Case closed
2/26/02	NOTICE OF APPEAL to Supreme Court by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr.
3/8/02	MOTION by plaintiff John Robert Smith, plaintiff Shirley Hall, plaintiff Gene Walker for Attorney Fees
3/12/02	NOTICE of filing of Affidavit of Pat H. Scanlon in Support of Motion for Attorney's Fees by plaintiff John Robert Smith, plaintiff Shirley Hall, plaintiff Gene Walker

Date	PROCEEDINGS
3/19/02	MOTION by defendants Eric Clark, Mike Moore, Ronnie Musgrove To Hold in Abeyance, or to Extend Time to Respond to Motion for Attorney Fees
4/23/02	MOTION by intervenor-defendants Beatrice J. Branch, Rims Barber, L C Dorsey, David Rule, James Woodard, Joseph Hudson, Robert R. Norvel Sr. to Declare that the State Court Plan in now Precleared under Section 5 of the Voting Rights Act
5/6/02	Letter from Supreme Court advising an appeal was filed 4/26/02 and placed on docket 4/29/02
5/28/02	TRANSCRIPT filed for dates of 11/14/01
6/3/02	ORDER denying [65-1] motion to Declare that the State Court Plan in now Precleared under Section 5 of the Voting Rights Act.

APPENDIX 2

IN THE CHANCERY COURT OF
HINDS COUNTY, MISSISSIPPI

BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON; and
ROBERT NORVEL PLAINTIFFS

vs. No. G-2001-1777 W/4

ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi DEFENDANTS

AMENDED COMPLAINT

(Filed Oct. 17, 2001)

This action for injunctive relief is brought to insure compliance with Mississippi law regarding the timing of congressional elections in the State of Mississippi.

1. Plaintiffs Beatrice Brance and Rims Barber are residents and registered voters of Hinds County, Mississippi and the presently existing Fourth Congressional District. David Rule and Melvin Horton are residents and registered voters of Holmes County, Mississippi and the presently existing Second Congressional District. Plaintiff James Woodard is a resident and registered voter of Webster County, Mississippi and the presently existing First Congressional District. He also is an elected Supervisor in Webster County. Plaintiff Joseph P. Hudson is a resident and registered voter of Harrison County, Mississippi and the presently existing Fifth Congressional District. He also is an elected supervisor in Jackson County. These plaintiffs have an interest in participating as voters in the regularly scheduled 2002 elections for members of Congress from the State of Mississippi. They also have an interest in insuring that the provisions of Mississippi law relating to the scheduling of those election are fully enforced.

2. Defendant Eric Clark is the Secretary of State of Mississippi. Defendant Mike Moore is the Attorney General of Mississippi. Defendant Ronnie Musgrove is the governor of Mississippi. Pursuant to § 23-15-211(1) of the Mississippi Code, the three of them constitute the State Board of Election Commissioners of the State of Mississippi. As occupants of the offices they hold, and as members of the State Board of Election Commissioners, they are responsible for the implementation and enforcement of Mississippi's election laws. They are sued in their official capacities as occupants of the offices they hold and as members of the State Board of Election Commissioners.

3. Mississippi law requires that the first step in decennial redistricting of congressional districts occur by December 3, 2001. Pursuant to § 5-3-123 and § 5-3-129 of the Mississippi Code, the Standing Joint Congressional Redistricting Committee of the Mississippi legislature must draw a congressional redistricting plan and present it to the legislature and governor no later than thirty days preceding the convening of the next regular session of the legislature after the publication of the results of the decennial census. The decennial census results were published in early 2001. The next regular session of the legislature convenes January 2, 2002. See Miss. Code

§ 5-1-7. Thus, the Committee's plan must be presented to the legislature and governor no later than thirty days prior to January 2, which is December 3, 2001.

4. Mississippi law requires that qualification of candidates running for Congress in the 2002 elections occur by March 1, 2002. See Miss. Code § 23-15-299. The new districting plan must be enacted well in advance of that time in order for the qualification to occur as scheduled.

5. As of the present time, the Joint Congressional Redistricting Committee has yet to adopt, recommend, or present a plan to the legislature and governor. The legislature has yet to adopt or implement a plan. Unless the legislature adopts a plan in time for it to be implemented in advance of the March 1 qualifying deadline, the interests of the plaintiffs and all Mississippi voters in enforcement of Mississippi's election laws will be compromised, and their rights under Mississippi law to participate in a congressional election process conducted in a timely manner will be violated.

6. This Court has jurisdiction of actions for injunctive relief of this type.

7. In the event the Committee fails to recommend, and the legislature fails to adopt, a congressional redistricting plan in a timely manner, it will be the duty of this Court to insure enforcement of the laws and to adopt and implement a congressional redistricting plan so that the plan can be in place in sufficient time for the candidate qualification and election process to go forward according to the schedule established by Mississippi law.

Accordingly, the plaintiffs request that this Court assume jurisdiction of this cause and further request that, in the event a congressional redistricting plan is not adopted by the legislature in a timely manner, this Court proceed to hold a hearing and issue an injunction adopting and directing the implementation of a congressional redistricting plan for the State of Mississippi that allows the candidate qualification and election process to go forward as required by Mississippi law. The plaintiffs also request any other relief to which they are entitled.

Respectfully submitted,

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APPENDIX 3

**IN THE CHANCERY COURT OF
THE FIRST JUDICIAL DISTRICT
OF HINDS COUNTY, MISSISSIPPI**

**BEATRICE BRANCH; RIMS BARBER;
L.C. DORSEY; DAVID RULE; MELVIN HORTON;
JAMES WOODARD; JOSEPH P. HUDSON;
and ROBERT NORVEL,**

Plaintiffs,

vs. **No. G-2001-1777 W/4**

**ERIC CLARK, Secretary of State of
Mississippi; MIKE MOORE, Attorney General
of Mississippi; RONNIE MUSGROVE, Governor
of Mississippi,**

Defendants.

SUPPLEMENTAL RESPONSE OF THE PLAINTIFFS TO THE PENDING MOTIONS TO DISMISS

This supplemental response summarizes and adds to the two responses previously filed by the plaintiffs in opposition to (1) the supplemental motion to dismiss of the defendants (response filed November 26, 2001, and (2) the motion to dismiss of the intervenors (response filed November 28, 2001). Because the two motions make different arguments, we believe it useful to summarize our arguments to both motions in a single response and to elaborate upon at least one of those arguments.

I.

Both the defendants and the intervenors contend this Court has no subject mater jurisdiction. But the United

States Supreme Court has said that "state courts have a significant role in redistricting," *Growe v. Emison*, 507 U.S 25, 33 (1993), and also has said: "The power of the judiciary of a State to require valid reapportionment or to require a valid redistricting plan has not only been recognized by this Court, but . . . has been specifically encouraged." *Id., quoting, Scott v. Germano*, 381 U.S. 407, 409 (1965). The Mississippi Supreme Court has made it clear that chancery courts have jurisdiction in election law cases such as this one. *Carter v. Lake*, 399 So.2d 1356, 1357-1358 (Miss. 1981); *Adams County Election Commissions v. Sanders*, 586 So.2d 829, 380 (Miss. 1991). *See also, Hathorn v. Lovorn*, 457 U.S 255, 269-270 (1982).[1]

II.

The intervenors argue that the only remedy for this situation is an at-large statewide election for all members of Congress pursuant to Miss. Code § 23-15-1039. They contend, accordingly, that this Court has no jurisdiction. As we previously noted in our response to the intervenors' motion, their argument regarding this remedy in no way deprives this Court of jurisdiction. Moreover, this is not a viable remedy for a number of reasons.

In filing this case, we have asked this Court to enforce Mississippi law and implement an election plan that complies with Mississippi law. Mississippi law sets

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[1] These authorities are discussed in more detail at pages 2-9 of our response to the defendants' supplemental motion to dismiss.

out an election schedule that requires candidate qualification on March 1, 2002, primary elections on June 4, 2002, and the general election on November 5, 2002. Mississippi law also clearly contemplates and requires election of members of Congress by districts. *See*, Miss. Code § 23-15-1033 ("Representatives in the Congress of the United States shall be chosen *by districts* on the first Tuesday after the first Monday of November in the year 1986, and every two (2) years thereafter. . . . "); § 5-3-123 (members of the Standing Joint Congressional Redistricting Committee of the legislature shall draw a plan to redistrict no later than 30 days preceding the next regular session of the legislature and shall submit it to the Governor and the legislature).[2]

But the intervenors contend that the remedy for a legislative impasse resulting from a decrease in the number of seats is set out in Miss. Code § 23-15-1039. They argue that this statute requires at-large elections. However, the statute does not, in fact, require at-large elections. Instead, it mandates at-large balloting only if the election is actually held "before the districts have changed to conform to the new apportionment." The present case is being brought so that this Court can adopt

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[2] Although the legislature obviously can adopt a plan without a recommendation from the Committee, the state law giving the Committee the authority to draw such a plan clearly contemplates that districts will be used. Otherwise, there would be no need to draw a plan. And, as just mentioned, § 23-15-1033 specifically states that members of Congress "shall be chosen by districts." ***See also, Adams County Election Commission v. Sanders***, 586 So.2d at 381 (referring to the one-person, one-vote principle of Art 3, § 14 of the Mississippi Constitution).

and implement a redistricting plan containing four congressional districts in time for the 2002 election schedule. Once that is done, the "districts [will] have changed to conform to the new apportionment," and there will be no need for at-large elections under the statute. Nothing in that statute remotely suggests that this Court, as a court of equity, does not have the authority to implement a districting plan in the wake of the legislative default that has occurred here. Thus, the statute does not require at-large elections in the situation that exists here, and it does not deprive this Court of jurisdiction.

Even if the statute did require at-large elections under the present circumstances, that remedy could not be imposed because it would be unlawful both as a matter of Mississippi constitutional law and federal law. First, at-large elections would specifically violate the federal statute requiring election of congressional representatives from districts.[3] 2 U.S.C. § 2c states:

> In each State entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected *only* from Districts so established . . . .

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[3] As previously mentioned, our claim in this case is brought specifically under Mississippi law and seeks to enforce Mississippi law. In response, the intervenors have claimed that § 23-15-1039 requires at-large elections. We raise federal law at this juncture only to show that even if this at-large option were required by that statute, it is not a viable solution because it violates both federal law and the Mississippi Constitution.

(Emphasis added).[4] Second at-large elections would dilute back voting strength by requiring that all members of Congress be elected from a majority-white electorate. This dilution would violate both Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and the equal protection component of Article 3, Section 14 of the Mississippi Constitution. *See, Jordan v. Winter*, 604 F.Supp. 807 (N.D. Miss. 1984) (three-judge court), *summary aff'd*, 469 U.S. 1002 (1984) (requiring that a majority black congressional district be created in Mississippi).

[4] In 1941, the Congress passed a statute that would have allowed the remedy of at-large elections where the state lost a seat and failed to redistrict. *See*, 2 U.S.C. § 2a(c)(5). But in 1967, Congress passed the statute just quoted in the text of this brief, 2 U.S.C. § 2c, which specifically mandates that "Representatives shall be elected *only from districts*." (Emphasis added). As the United States Supreme Court stated in *Whitcomb v. Chavis*, 403 U.S 124, 159 n. 39 (1971): "In 1941, Congress enacted a law that required that . . . if there is a decrease in the number of representatives and the number of districts in the State exceeds the number of representatives newly apportioned, all representatives shall be elected at large. . . . In 1967, Congress *reinstated the single-member district requirement*." (Emphasis added). *See also, Shayer v. Kirkpatrick*, 541 F.Supp. 922, 926-927 (W.D. Mo. 1982) (three-judge court) ("we conclude that the later statute, section 2c, repealed section 2a(c)(5) by implication," so that "the only appropriate remedy is a court-ordered apportionment" rather than at-large elections), *summarily affirmed sub. nom. Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982); *Assembly of California v. Deukmajian*, 639 P.2d 939, 954-955 (Cal. 1982) ("Congress intended 2c to supersede the provisions of section 2a, subdivision (c)" and "an at-large election . . . would contravene the congressional mandate set forth in section 2c.").

For all of these reasons, at-large elections are not a viable option, and Miss. Code § 23-15-1039 does not deprive this Court of jurisdiction.

III.

In the supplemental motion to dismiss, the Attorney General contends that the three defendants, the Governor, the Secretary of State, and the Attorney General, are not proper defendants. But in a line of Mississippi redistricting cases going back some 35 years, these three officials always have been the lead state defendants. *See, e.g., Connor v. Johnson*, 256 F.Supp. 962, 963-964 (S.D. Miss. 1966) (legislative and congressional redistricting); *Jordan v. Winter*, 541 F.Supp. 1135, 1137 (N.D. Miss. 1982) (congressional redistricting); *Martin v. Allain*, 658 F.Supp. 1183, 1186 (S.D. Miss. 1987) (judicial districts); *Watkins v. Mabus*, 771 F.Supp. 789, 792 (S.D. Miss. 1991) (legislative redistricting); *NAACP v. Fordice*, 252 F.3d 361, 364 (5th Cir. 2001) (public service and transportation commissioners).[5] Neither the courts nor the Mississippi Attorney

[5] Some of these cases also have named legislative leaders as defendants, while others have not (and in one case the legislators voluntarily intervened). The absence of them as defendants in some of the cases suggests, of course, that they are not necessary parties. This is particularly true in light of the fact that the plaintiffs in the present case are not asking the Court to order the legislature to do anything. Instead, the plaintiffs are simply asking that the Court implement a lawful plan for the congressional elections in the event the legislature does not do so on its own. As indicated by the cases just cited, these three state officials – as occupants of their offices and as members of the State Board of Election Commissioners – are the proper defendants for that purpose. If the legislative leaders

General appear ever to have raised a question about whether these are the proper defendants. Moreover, in the parallel federal case that is presently pending and that relates to congressional redistricting, the Attorney General has not filed any motion to dismiss based on this ground, and has not suggested to the court that these are improper defendants.

Clearly, these are proper defendants to represent the interests of the State of Mississippi and to implement any new redistricting plan if the legislative impasse continues and this Court is required to order equitable relief. ***See, Connor v. Finch***, 469 F.Supp. 693, 694 (S.D. Miss. 1979) (imposing new districting plan for legislative elections by issuing injunction solely against Governor, Secretary of State, and Attorney General). These three officials comprise the State Board of Election Commissioners. They all are responsible for upholding and enforcing Mississippi law, and the Secretary of State is the state's chief election officer. This is not a basis for dismissing this case.[6]

IV.

The intervenors contend that the Republican and Democratic executive committees are indispensable parties for the purpose of imposing the remedy. But the committees were not parties in at least some of statewide redistricting litigation that has occurred in Mississippi

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wish to participate, they are free to file a motion to intervene or motion for leave to participate *amicus curiae*.

[6] This is discussed more at pages 9-10 of our response to the defendants' supplemental motion to dismiss.

over the years and that has led to new redistricting plans – particularly the thirteen year battle over legislative districts that lasted from 1966-1979. ***See, Connor v. Johnson***, 256 F.Supp. at 963-964; ***Connor v. Finch***, 469 F.Supp. at 694. ***See also, Grove v. Emison***, 507 U.S. at 27-28; ***Emison v. Growe***, 782 F.Supp. 427 (D. Minn. 1992) (three-judge court) (political parties were not defendants in either the state or federal court congressional redistricting cases that led to the Supreme Court's decision in *Growe*, and no one suggested they were necessary parties for congressional redistricting litigation). Under the law, the political parties must hold primaries under whatever plan is adopted by the State or the appropriate court, and as long as the state defendants are included, the political parties need not be named as defendants. This is not a proper basis for a motion to dismiss.[7]

V.

As all parties agree, any plan adopted by this Court must be precleared under Section 5 of the Voting Rights Act. However, the intervenors argue that preclearance must be obtained before this Court even holds hearings. That is simply not correct, and the intervenors cite no case law mandating such a requirement. Indeed, all of the case law demonstrates the contrary. ***See, Hathorn v. Lovorn***, 457 U.S. at 269-270 (United States Supreme Court holds that where a chancery court orders a new election plan implemented, the change must be precleared, but

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[7] This is discussed more at pages 2-3 of our response to the intervenors' motion to dismiss.

the Court never suggested that preclearance should have been obtained before the chancery court held hearings); ***Adams County Election Commission v. Sanders,*** 586 So.2d at 830 (same).[8] Redistricting litigation has proceeded in a number of state courts in other states that are covered by Section 5 of the Voting Rights Act, but no court has ever held that preclearance must be obtained before the state court holds hearings.

For all of these reasons, as well as those stated in our prior responses, the motions to dismiss should be denied.

Respectfully submitted,

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Counsel for Plaintiffs

[8] This is discussed more fully at page 3 of our response to the intervenors' motion to dismiss

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been delivered by fax and by first class mail to the following:

T. Hunt Cole, Jr.
Office of the Attorney General
P.O. Box 220
Jackson, MS 39205

Grant Fox
P.O. Box 797
Tupelo, MS 38802-0797

F. Keith Ball
P.O. Box 954
Louisville, MS 39339

This 3rd day of December, 2001.

/s/ Robert B. McDuff
Counsel for Plaintiffs

APPENDIX 4

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. 3:01CV855WS

ERIC CLARK, ET AL. DEFENDANTS

COURT REPORTER'S TRANSCRIPT OF HEARING

BEFORE THE THREE-JUDGE PANEL CONSISTING OF:

HONORABLE E. GRADY JOLLY
UNITED STATES CIRCUIT JUDGE

HONORABLE HENRY T. WINGATE
UNITED STATES DISTRICT JUDGE

HONORABLE DAVID C. BRAMLETTE, III
UNITED STATES DISTRICT JUDGE

Jackson, Mississippi
January 16, 2002

APPEARANCES:

MR. ROBERT B. MCDUFF
MR. CARLTON W. REEVES

Representing the Intervenors

MR. MICHAEL B. WALLACE
MR. ARTHUR F. JERNIGAN, JR.
MR. F. KEITH BALL
MR. GRANT M. FOX
MR. CHRISTOPHER R. SHAW
MS. STACY O'NEILL

Representing the Plaintiffs

* * *

[p. 11] MR. MCDUFF: Thank you, Your Honor. Let me mention a couple of sort of general things and then get down to the specifics. One thing that would affect the time involved is whether at large elections are on the table. Our view is that at large elections are not permissible, particularly where the court has the opportunity and the time to draw a plan. If there were something the court was actively considering, we would need to put on evidence, I believe, to bolster our contingent or to refute any contrary contention that –

JUDGE JOLLY: I think I can tell you that that is a reasonably remote – I mean we are assuming, and, in fact, the reason that we are acting as we are is a determination to make sure that the election under one plan or another begins the process on March 1st. And that assumes that there will be districts drawn.

MR. MCDUFF: Okay, very well. That being the case, it would be unnecessary for us to present evidence regarding whether at large elections would violate Section 2 of the Voting Rights Act.

* * *

APPENDIX 5

U.S. Department of Justice

Civil Rights Division

JDR:RSB:TCH:RJD:nj
DJ 166-012-3
2001-4084

Voting Section
950 Pennsylvania Avenue, Room 7254
Washington, D.C. 20530

April 1, 2002

The Honorable Michael Moore
Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205-0220

Dear Mr. Attorney General:

This refers to the Orders dated December 21 and 31, 2001, of the Chancery Court of Hinds County in *Branch v. Clark* adopting a 2001 congressional redistricting plan and the Order dated December 13, 2001, of the Supreme Court of Mississippi in *In Re Mauldin*, authorizing the Chancery Court to adopt a congressional redistricting plan, for the State of Mississippi, submitted to the Attorney Gneral pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your response to our February 14, 2002, request for additional information on February 19-20, 2002.

We understand that the federal court in *Smith v. Clark* (S.D. Miss.) has found the changes effected by the Orders in *Branch v. Clark*, and *In Re Mauldin*, to be unconstitutional

under Article I, Section 4 of the United States Constitution, and has enjoined their implementation on that basis. We further understand that applications for an emergency stay have been sought and denied by the United States Supreme Court, but that an appeal remains pending. Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General. Accordingly, it would be inappropriate for the Attorney General to make a determination concerning your submission now. *See Procedures for the Administration of Section 5* (28 C.F.R. 51.22(a), 51.35). If the injunction against implementation of these changes is lifted, upon notification, the Attorney General will again consider these changes for preclearance unless the state notifies us of its intent to alter them. Any documentation previously provided need not be resubmitted. Refer to File No. 2001-4084 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

/s/ Joseph D. Rich
Joseph D. Rich
Chief, Voting Section

APPENDIX 6

IN THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF MISSISSIPPI

JOHN ROBERT SMITH, SHIRLEY HALL, and GENE WALKER,
Plaintiffs,

vs. **No. 3:01cv855**

ERIC CLARK, Secretary of State of Mississippi; MIKE MOORE, Attorney General of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE; and MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE,
Defendants,

and

BEATRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL,
Intervenors.

INTERVENORS' MOTION TO DECLARE THAT THE STATE COURT PLAN IS NOW PRECLEARED UNDER SECTION 5 OF THE VOTING RIGHTS ACT

[filed April 23, 2002]

This Court's February 26 injunction against the state court congressional redistricting plan was based on (1) the holding

that preclearance under Section 5 of the Voting Rights Act had not been obtained, and (2) the additional holding that even if preclearance is obtained, the courts of Mississippi have no power to act in matters of congressional redistricting in light of Article I, § 4 of the United States Constitution. Because of intervening events, we contend that the plan has now unquestionably been precleared. Accordingly, we move this Court to declare that it is precleared. Although the injunction will remain in place in light of the constitutional holding, a holding that the plan has been precleared will narrow the issues in the pending appeal before the United States Supreme Court.

Section 5 provides that a redistricting plan is precleared if "the [United States] Attorney General has not interposed an objection within sixty days after [the] submission" of the plan. 42 U.S.C. § 1973c. A second sixty-day review period under Section 5 has now passed without an objection by the Attorney General. While the Department of Justice claimed in an April 1, 2002 letter that this Court's federal constitutional ruling renders the state court plan incapable of administration, and therefore "not ripe" for Section 5 review, the language of Section 5 does not allow for postponement of the sixty day period on that ground. Thus, the plan has been precleared.

This Court's February 26 order specifically retained jurisdiction of this case. Although the injunction has been appealed to the Supreme Court, this Court has the authority to resolve matters that arise in the interim. At present, the injunction is based both upon the constitutional ruling and the Section 5 ruling. We contend that intervening events require the Section 5 ruling to be vacated. This Court should promptly address the matter in the first instance. Although the Supreme Court appeal will remain in place irrespective of this Court's decision on the matter, that decision will affect the scope of the appeal. For example, if this Court declares the plan now

precleared, the Supreme Court likely will not need to address any of the additional Section 5 issues that presently are raised in the appeal.

In further support of this motion, the following is submitted:

On February 14, 2002, the United States Department of Justice requested more information regarding the State's December 26, 2001 submission under Section 5. The Mississippi Attorney General submitted that information on February 19, 2002. The United States Department of Justice contended that this request restarted the original sixty day statutory review period under Section 5 once the additional information was submitted. Over the intervenors' objection, this Court agreed. On February 26, 2002, with no decision having been made by the United States Attorney General under Section 5, this Court enjoined implementation of the state court congressional redistricting plan that had been included in the December 26 submission.

Even if this Court was correct that the February 14 request for more information invalidated the original sixty day statutory review period, the review period was restarted on February 19 when the Mississippi Attorney General submitted the additional information. That period expired on or before April 22, 2002, which was the first weekday after the sixtieth day after February 19. Under the terms of Section 5, the state court plan "may be enforced" if "the Attorney General has not interposed an objection within sixty days after [the] submission" of the plan. Because the Attorney General has not interposed an objection on or before April 22, the plan has been precleared.

Other than the February 14 request for more information,

the only formal communication from the United States Department of Justice to the Mississippi Attorney General regarding the Section 5 submission came on April 1, 2002. In a letter dated that day, the Chief of the Voting Section of the Civil Rights Division acknowledged that the additional information was received on February 19-20. However, the April 1 letter also stated that, in light of this Court's Article I, § 4 holding, "it would be inappropriate for the Attorney General to make a determination concerning [the] submission now." The letter said: "Where voting changes submitted by the State have been enjoined by a federal court, they are not presently capable of administration, and are not ripe for review by the Attorney General." The letters added that "[i]f the injunction against implementation of these changes is lifted, . . . the Attorney General will again consider these changes for preclearance." (A copy of the April 1 letter is attached as Exhibit 1. A copy of the February 19 submission of the additional information is attached as Exhibit 2).

However, this Court's Article I, § 4 holding does not postpone the statutory sixty-day review period. Section 5 provides that when any covered state "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964," it may obtain the requisite federal preclearance "if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission . . . ." The State of Mississippi, through its courts, has "enact[ed] or seek[s] to administer"the state court redistricting plan. This is reflected in the Mississippi Supreme Court's December 13, 2001 ruling and the December 21 opinion and order of the Chancery Court of Hinds County.

This Court's holding to the effect that the Mississippi courts do not have that power as a matter of federal constitutional law does not change the fact that the state courts have "enact[ed]" or "seek to administer" the state court plan.

Although the April 1 Department of Justice stated that the plan is not "presently capable of administration" because of this Court's constitutional injunction, Section 5 does not require that the plan be "capable of administration." It simply requires that the state authorities "enact or seek to administer" the plan. Once the plan is submitted, the statutory sixty day review period begins. Nothing in the statute allows the Attorney General to postpone the sixty day period simply because a federal court enjoins the plan on federal constitutional grounds.

In *Morris v. Gressette*, 432 U.S. 491 (1977), the Supreme Court noted that under Section 5, a covered jurisdiction may preclear a voting change by obtaining a declaratory judgment from the Federal District Court for the District of Columbia or, alternatively, "may submit [the] change . . . to the Attorney General and subsequently may enforce the change if 'the Attorney General has not interposed an objection within sixty days after such submission.'" *Id.* at 502. Under this alternative method, said the Court, "compliance with § 5 is measured solely by the absence, for whatever reason, of a timely objection on the part of the Attorney General." *Id.* The Court added:

> We think it clear that Congress intended to provide covered jurisdictions with an expeditious alternative to declaratory judgment actions. The congressional intent is plain: The extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. Although there was to be no bar to subsequent constitutional challenges to the implemented legislation, there also was to be "no dragging out" of the extraordinary federal remedy beyond the period specified in the statute.

Id. at 504. Also, the Court pointed out that "the Attorney General's failure to object is not conclusive with respect to the constitutionality of the submitted state legislation." *Id.* at 505.

Thus, the Supreme Court recognized that federal courts might enjoin voting changes on constitutional grounds independent of any Section 5 review. At the same time, the Court said review by the Attorney General must provide an "expeditious" means of preclearance and may not be "'dragg[ed] out' . . . beyond the period specified in the statute." This strongly indicates that a constitutional injunction does not postpone the statutory sixty day review period.

The need for a prompt decision on a Section 5 submission, independent of any constitutional injunction, is illustrated by the fact that "States must often redistrict in the most exigent circumstances." *Growe v. Emison*, 507 U.S. 25, 35 (1993). If a federal court enjoins a redistricting plan on constitutional grounds, the injunction is subject to being vacated on appeal, perhaps through emergency review. However, if the United States Attorney General can postpone the sixty day period when an injunction is entered, the covered jurisdiction will be unable to implement the plan promptly even if the injunction is vacated. The jurisdiction will be required to await renewal and completion of the interrupted Section 5 review process. The language of Section 5 does not allow for this sort of delay.

Of course, if the Attorney General is unable — as we

contend — to postpone the sixty period, there is the possibility that the completion of the Section 5 review process will have been in vain if the constitutional injunction is not lifted on appeal. But if Congress had believed this to be a problem, it would have written the statute to stop the sixty day period when such an injunction was issued. It did not do so, and the statutory terms of Section 5 do not allow for suspension of the review period on this basis.

In light of the foregoing, this motion should be granted.

Respectfully submitted,

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Counsel for Intervenors

[certificate omitted in printing]

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

JOHN ROBERT SMITH, SHIRLEY HALL, AND GENE WALKER — **PLAINTIFFS**

V. — **CIVIL ACTION NO. 3:01-CV-855WS**

ERIC CLARK, Secretary of State of Mississippi, MIKE MOORE, Attorney General for the State of Mississippi; RONNIE MUSGROVE, Governor of Mississippi; MISSISSIPPI REPBULICAN EXECUTIVE COMMITTEE; AND MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE DEFENDANTS

AND

BEARTRICE BRANCH; RIMS BARBER; L.C. DORSEY; DAVID RULE; JAMES WOODARD; JOSEPH P. HUDSON; and ROBERT NORVEL — **INTERVENORS**

ORDER

[filed June 3,2002]

IT IS ORDERED that the Intervenors' Motion to Declare that the State Court Plan is Now Precleared Under Section 5 of the Voting Rights Act is DENIED.

SO ORDERED, this 3d day of June, 2002.

/s/ E. Grady Jolly
E. GRADY JOLLY
United States Circuit Judge

/s/ Henry T. Wingate
HENRY T. WINGATE
United States District Judge

/s/ David C. Bramlette
DAVID C. BRAMLETTE
United States District Judge